JD(SF)–16–06
Springfield, MO

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SOLO CUP COMPANY

and Case 17-CA-22768

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1553

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for the General Counsel.

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Michael Brumley, President, Local 1553 IBEW
of Springfield, MO, for the Charging Party.

DECISION

Statement of the Case

Thomas M. Patton, Administrative Law Judge. A hearing was held in this matter at Springfield, Missouri, on November 29-30, 2005. The initial charge was filed by International Brotherhood of Electrical Workers, Local 1553 (the Union) on June 14, 2004 and was thereafter amended. The complaint issued on August 26, 2004, and alleges that Solo Cup Company (the Respondent) has violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent answered, denying any violation. The parties filed post-hearing briefs that have been carefully considered.

I. Findings of Fact

A. Jurisdiction

The Respondent is a corporation with an office and place of business in Springfield, Missouri. The record shows that Respondent meets the Board's standards for asserting jurisdiction and is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

B. The Labor Organization

The record shows that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Background and Evidence

The questions presented are whether the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to sign negotiated collective bargaining agreements covering separate production and maintenance units at a manufacturing plant operated by the Respondent in Springfield, Missouri (the Plant) and refused to implement negotiated pension plan changes. It is agreed that at all times material the Union has been the Section 9(a) representative of separate production and maintenance units at the Plant. The Springfield, Missouri facility is one of several manufacturing plants operated by the Respondent in various states.

The Respondent concededly refused to sign negotiated collective bargaining agreements and refused to implement changes in retirement benefits for a class of early retirees addressed in the agreements. The Respondent contends that it did not violate the Act, arguing that it had no duty to sign the agreements or implement those retirement benefits changes because it became clear after the written agreements were prepared that there had been no mutual meeting of the minds regarding the changes in early retirement benefits.

The last collective bargaining agreement covering the Production Unit expired on February 24, 2004, and covered the following appropriate unit:

> All production and warehouse employees, as certified by the National Labor Relations Board in Case Number 17-RC-6778, of the Springfield plant, excluding supervisors, office and plant clerical employees, guards, watchmen, professional and technical employees, maintenance and powerhouse employees as certified by the National Labor Relations Board in Case Number 17-RC-5816 and any other employees excluded by law.

The last collective bargaining agreement covering the Maintenance Unit expired on February 29, 2004, and covered the following appropriate unit:

> All maintenance employees employed in the classifications of spare parts attendant, oiler, groundskeeper, power cleaner operator, truck repair mechanic, utility worker, utility worker BP@G, electrician, maintenance mechanic, and shift engineer as certified by the National Labor Relations Board in Case Number 17-RC-5816, excluding supervisors, office and plant clerical employees, guards, watchmen, professional and technical employees, and any other employees excluded by law.

Beginning February 16, 2004, the Union and the Respondent began negotiations for new collective bargaining agreements. The negotiations for the two units were held together. The General Counsel contends that there was complete agreement on all terms of new agreements, but the Respondent refused to comply with the new agreements and refused to sign written agreements containing the agreed upon terms. Other than new early retirement benefits changes at issue, it is agreed that the Union and the Respondent reached agreement on all terms of new labor agreements for the two units. The negotiated retirement benefits at issue were identical for both units.

The retirement benefits at issue are a defined benefit pension plan and retiree medical benefits for a particular class of employees, based on an employee's age and years of service.

The expired agreements each included, in relevant part, the following provisions regarding retiree pensions:

> Retirement Plan
>
> The Lily-Tulip Hourly Retirement benefits shall be ... $23.00 for all past and future years of credited service. A copy of the retirement plan will be provided to employees. The Company will provide all employees the choice of the Defined Benefit Plan or the Company 401(k) Plan. An employee that chooses the 401(k) Plan will be required to freeze the Defined Benefit Plan at the level of benefit and the number of years of service. Once the 401(k) Plan is chosen, there are no return rights to the Defined Benefits Plan. All new hires on or after March 3, 2001, will be eligible for the 40 1(k) Plan only.

The details of the defined benefit retirement plan were described in a separate document titled "Bargaining Unit Pension Plan" (the Pension Plan).

The Pension Plan reflects that it was effective January 1, 1987 and was revised in August 1994. The trusteed Pension Plan provides that the Respondent reserved the right to amend the plan at any time. The Pension Plan defines "normal retirement age" as the employee's 65th birthday. The Pension Plan provides:

> II. D. Amount and Form of Monthly Pension At or After Age 65
>
> 1. Formula Amount
>
> If you retire on or after Normal Retirement Age, your monthly benefit is determined by multiplying your years of Benefit Service by the "Annual Credit Factor" applicable under the collective bargaining agreement in effect for your employing unit.

The applicable "Annual Credit Factor" specified in the expired agreements was $23.00. The Pension Plan also provides for early retirement with a reduced pension. The Pension Plan provides:

> II. E. Amount and Form of Early Retirement Pension
>
> You can retire before age 65 if you are at least 55 and have completed at least 10 years of Vesting Service. However, if you retire before age 62, your pension is reduced to its "actuarial equivalent" using the same interest rate and actuarial assumptions as are used for determining benefits at or after age 65. If you retire on or after age 62, but before age 65, the, monthly pension is the same as the age 65 benefit, without any reduction.

Medical benefits for retirees were addressed in the expired collective bargaining agreements as follows:

> Retiree Benefits
>
> The Company will provide to each retiree and his spouse at time of retirement up to Two Hundred thousand Dollars ($200,000.00) of hospital, surgical insurance

> for hospital and surgical benefits incurred after retirement between the ages of sixty (60) and sixty-five (65) on the basis of the benefits provided in the Group Benefit Plan for active employees.
> ...
> When the retiree reaches age sixty five (65), the retiree and spouse will start on a new Eighteen Thousand Dollar ($18,000.00) maximum benefit plan.
> ...
> Employees shall pay for retirement medical costs on the following basis:
> Employees who retire between the ages of 60-62 will pay the group cost.
> Employees who retire between the ages of 62-65 will pay regular contributions.
> Employees who retire at the age sixty-five (65) or over will be provided coverage at no cost.
> ...

Neither of the expired collective bargaining agreements nor the Pension Plan provided medical benefits for employees who retired before age 60 nor did they provide for retirement benefits for retirees under age 55.

The Respondent and the Union agreed in the 2004 negotiations that there would be an additional basis for retirement referred to by the parties as "80 and Out." The General Counsel contends that the agreed upon terms of the 80 and Out plan were that if the sum of an employee's age and years of service was 80, the employee would be eligible to retire with the same unreduced pension as an employee with the same years of service retiring at age 62. The Respondent contends that it agreed only that such an employee could retire with the reduced "actuarial equivalent" pension of an employee retiring before age 62, as provided in the expired agreements.

It is not disputed that the Respondent and the Union agreed in negotiations that if the sum of a retiring employee's age and years of service was 80, the employee was eligible to retire under the 80 and Out plan with the reduced medical benefits that were available to employees retiring at age 65 or over.

Beginning on February 16, 2004,[1] the Union and the Respondent met six times to negotiate successor agreements to the expiring agreements covering the Production Unit and the Maintenance Unit. Throughout the negotiations the proposals and discussions regarding early retirement addressed both units jointly.

The initial meeting was on February 16. The Respondent's negotiation team included Skip Boyles (human resources vice-president), Paul Kraft (plant manager), Dave Mathas (department head), Robert Bailey (human resources director) and Paul Barnett (corporate human resources director). The principal Respondent spokespersons during the negotiations were Boyles and Kraft. Boyles was the lead negotiator.

The Union was represented by Mike Brumley (president and business manager), Tad Gusta (international union representative), Charlie Edwards (maintenance unit steward), Dennis Shortt (production steward) and Roy Garner (production employee). The principal Union spokespersons during the negotiations were Brumley and Gusta. It appears that Brumley was the lead negotiator.

[1] Unless otherwise noted, all dates hereafter are 2004.

Shortly before the initial negotiation meeting the Respondent had assumed operation of the plant as a part of a corporate acquisition. The plant had previously been operated by Sweetheart Cup Company and was acquired as a going business and Respondent assumed the existing collective bargaining obligations. The details of the acquisition are not material. Boyles spoke first at the February 16 meeting. He emphasized that wages and benefits were higher than at other plants operated by the Respondent and for competitive reasons the labor costs at the Springfield plant needed to be closer to those of other of Respondent's plants. The Respondent clearly indicated that its agenda was to control wage and benefits costs.

Kraft then read a prepared statement in which he detailed the Respondent's assessment of wages, benefits and productivity at the Springfield plant. The thrust of Kraft's remarks was that the Respondent intended to bargain for reduced costs.

The Respondent presented a written contract proposal to the Union. This initial proposal contained many changes from the expiring agreements. The proposed changes in pension benefits included freezing the existing defined benefit plan and making a 401(k) plan available. The Respondent also proposed to increase the years of service required to qualify for retiree medical benefits.

On February 17 the parties met and reviewed the Respondent's proposal and the Union noted its disagreement with much of the Respondent's proposal, including the proposed freezing of the defined benefit plan.

The parties next met on February 18. The Union submitted a written proposal. The Union proposal consisted of proposed deletions, additions and modifications of the expiring agreements.

Regarding retirement benefits, the initial Union proposal stated:

> <u>RETIREMENT PLAN</u>
> Production/Maintenance
>
> Article 27 [2]
> <u>Add:</u> 80 and out with full benefits
> <u>Change</u>: Benefit from $23.00 to:
> $25.00 – first year
> $27.00 – second year
> $29.00 – third year

The discussions regarding 80 and Out at the February 18 meeting was limited to Brumley explaining that 80 and Out meant that "when an employee met the number 80, which is age and years of service, that he could retire at full benefits with age 62 medical coverage." There was no discussion of specifically how an 80 and Out pension would be calculated or the meaning of "full benefits".

On February 19, the parties met and the Respondent provided a written response to the Union's February 18 proposal, which it also read to the Union. The response to the Union's retirement proposal stated only, "The Company disagrees with 80 and out." There was no discussion of 80 and Out at that meeting.

[2] Actually Article 26 in the Maintenance contract and Article 27 in the production contract.

There were negotiation meetings on February 23, 25 and 26, but the Union's 80 and Out proposal was not discussed. The next negotiation meeting was on February 27. A proposed contract submitted by the Respondent was on the table at the February 27 meeting. That written proposal did not address 80 and Out.

On February 27 Boyles verbally proposed an "85 and Out" retirement plan. Brumley testified that 85 and Out was a counteroffer to the Union's 80 and Out proposal, that the Respondent negotiators made no explanation of the proposal and that the Union asked no questions. Boyles was asked what the wording of the proposal was and he testified, "The 85 And Out would have been at a reduced pension benefit and acceptance of an $18,000.00 cap medical program." Boyles testified that there was no further explanation, discussion or questions regarding the proposal. Kraft corroborated Boyles and testified that Boyles explained to the Union that the 85 and Out proposal was for a reduced pension. Barnett testified as a Respondent witness, but was not asked about the February 27 meeting. Edwards testified as a government witness, but not about the 85 and Out proposal. The sparse negotiation notes in evidence are unhelpful. I credit Boyles' testimony that the $18,000.00 cap was proposed as an element in the 85 and Out proposal. This conclusion is based in part on the circumstances of later amended proposal by the Union for 80 and Out, but with an $18,000.00 cap. It is improbable, however, that there would have been no questions and no explication of the terms of a reduced pension, had it been proposed. A letter sent to the Region during the administrative investigation, which was prepared with Boyle's assistance, stated that there was no discussion of the amount or percentage of retirement benefit a retiring employee would receive, if they retired under the 85 and Out proposal. The testimony of Boyles and Kraft that a reduced pension was explicitly mentioned as a part of the 85 and Out proposal was unconvincing and that testimony is not credited. I conclude that a reduced pension was not explicitly part of the 85 and Out proposal made to the Union on February 27.[3]

The parties met next on March 9. The Union urged the Employer to agree to the Union's 80 and Out proposal and there was discussion of medical benefits for retirees under the proposal. The Union stated a willingness to limit employees retiring under the 80 and Out proposal to the medical benefits then provided to employees retiring at age 65, which had a cap of $18,000.00. Brumley was unable to describe how this substantial concession by the Union came about. This was the $18,000.00 cap proposal advanced by the Respondent on February 27.

The parties caucused and when the meeting resumed the Respondent advised the Union that the 80 and Out proposal was accepted. Boyles and Kraft testified that Boyles had explicitly told the Union on March 9 that the Respondent's 80 and Out agreement included a reduced pension. Boyles testified that he said, "That we could offer the 80 and Out benefit. There would be an $18,000.00 maximum lifetime cap, for anyone that accepted that and a reduction down, through age 55, for anyone that qualified, for the benefit program." Kraft testified that he believed Boyles actually used the words "actuarially reduced benefit to age 55." In contrast to the Respondent witnesses, Brumley had a hazy recollection on direct examination of what was said about 80 and Out on March 9. He was recalled as a rebuttal witness and

[3] Although not essential to this credibility resolution, I also draw an adverse inference from the failure of the Respondent to elicit testimony from Barnett regarding the February 27 meeting. *Cold Heading Co.,* 332 NLRB 956 (2000); *GATX Logistics, Inc*., 323 NLRB 1, 4 fn. 9 (1997) and the cases cited there.

denied that the "Company's interpretation of 80 and Out with full benefits" was discussed during negotiations.

Dennis Shortt was at or approaching eligibility for 80 and Out retirement. After the Respondent agreed to 80 and Out retirement on March 9, Shortt calculated what he anticipated his potential retirement benefits would be by multiplying 30 times $23.00 and 30 times $28.00. He did this while sitting at the negotiation table in the presence of the other Union and Respondent negotiators. Shortt testified that he announced the result of his calculations. The record does not establish that the calculations Shortt credibly testified he made at that time were shown to the management representatives or that Shortt stated how he had calculated his pension. Kraft and Boyles' testimony did not exclude the possibility that Shortt stated in their presence of the amount of the pension he anticipated receiving. Shortt's testimony that he did state to those present what he anticipated receiving under 80 and Out is corroborated by Brumley and is credited. Kraft commented to the effect that he wished he had a similar retirement plan. Shortt also calculated the pensions of others. It is improbable that anyone present would assume that that Shortt was calculating actuarially reduced pensions. I conclude that Shortt understood, correctly or not, that the 80 and Out agreement provided an unreduced pension based upon the result of multiplying years of service times the negotiated Annual Credit Factor.

The testimony of Boyles and Kraft that the accepted 80 and Out proposal they proposed was expressly defined as providing an actuarially reduced pension is inconsistent with the Respondent's position statement submitted during the administrative investigation, which Boyles acknowledged was accurate. Thus, Boyles testified on cross-examination and reiterated on redirect that the accuracy of Respondent's position statement filed during the administrative investigation, which stated "it is significant that at no time during any bargaining session or any other discussion between the parties was there any discussion whatsoever, as to the meaning of the '80 and Out' provision or the level or amount of Pension ... benefit an employee would receive, under the '80 And Out' option".

Considering all the foregoing, I do not credit the testimony by Boyles and Kraft that Boyles told the Union on March 9, in substance, that the 80 and Out proposal accepted by the Union contemplated an actuarially reduced pension and I find that a reduced pension was not expressly a part of the 80 and Out agreement.[4]

At the conclusion of the March 9 meeting, the Respondent prepared and distributed at that time a memorandum that read:

> Employees will have the option upon reaching combined age and years of service totaling 80 years for retirement with full benefits at the age 65 level medical insurance cost and benefits.[5]

The memorandum also indicated (by its being printed in italics) that a remaining open issue at the conclusion of the March 9 negotiations was the Employer's proposal to freeze the defined benefit plan at the vested years of seniority as of February 29, and at the existing $23.00 Annual

[4] Although not essential to this credibility resolution, I also draw an adverse inference from the failure of the Respondent to elicit testimony from Barnett regarding the March 9 meeting. *Cold Heading Co.,* 332 NLRB 956 (2000); *GATX Logistics, Inc*., 323 NLRB 1, 4 fn. 9 (1997) and the cases cited there.

[5] Retirees paid a health insurance premium.

Credit Factor for past years of service. No one objected to the accuracy of the memorandum. This is consistent with the credible testimony of Brumley that those issues were not resolved until March 10, as well as Boyles' testimony that Respondent Exhibit 8, which indicates that increasing the $23.00 dollar rate was an open issue ("$0 additional contribution"), was written on March 10. Accordingly, I find that the testimony by Dennis Shortt on cross-examination that the Union conceded on the issue of freezing the Annual Credit Factor on March 9 was incorrect.

The parties resolved the remaining open contract issues on March 10, and Kraft distributed a three page list titled "Agreed to Items", which the Union used to prepare a summary for a ratification vote and which the Respondent used to prepare contract drafts. The agreement was ratified on March 14. The terms of the contract were then implemented by the Respondent, except the 80 and Out retirement provision.

On a Friday in March, following the ratification vote, production employee Jerry Brown went to the Plant personnel office and sought clarification from Barnett regarding the new 80 and Out retirement plan. Brown met the age plus years of service standard. Carolyn Jones was in the area. Jones used the title Human Resources Assistant and was referred to by Kraft as being HR Secretary for the Plant. Jones no longer worked for the Respondent at the time of the hearing and is not an alleged agent. Brown testified:

> A I asked Mr. Barnett -- I said I wanted to clarify this 80 and out, what it entailed, and he said to me, he said, as far as I know, he said it is your retirement not pro-rated and insurance and your insurance at the present rate.
> Q Do you recall what, if anything else was said?
> A Really not much, no.

Barnett's version of the meeting with Brown was that Brown and wanted to know more about the 80 and Out program and was considering retiring under the program. Barnett testified that he "mainly" addressed the $18,000.00 cap on health insurance, because he understood that Brown had health problems and that he did not "indicate any formula or any way of -- without giving a specific Dollar amount, indicate to him what his benefit might be." Barnett did not specifically deny Brown's testimony that his pension would not be prorated. Barnett testified that he had been instructed to refer employees with retirement questions to a corporate benefits specialist.

Brown impressed me as a witness who was not intentionally testifying falsely, but who had a less that perfect recollection of what was said. As shown by Barnett's testimony, Brown was not concerned about insurance and the subject of insurance was raised by Barnett. Thus, Brown's only concern was his pension. Whatever the meaning of the 80 and Out agreement reached, it would not involve proration. Moreover, the newly negotiated retiree medical benefits and employee contributions were different from those of active employees and different from those under the last expired agreements. Nevertheless, I credit the substance of Brown's testimony that he met with Barnett to learn more about what he would receive under 80 and Out and that he understood, based on that conversation, that he that he would be receiving an unreduced pension.

Barnett told Brown that Jones could give him the name and phone number of the person he needed to talk to begin the retirement process. Brown credibly testified that on the following Monday, he returned to the personnel office and told Barnett that he wanted phone numbers of the person he would need to contact. Jones gave Brown the name and phone number of corporate benefits analyst Yvonne Sylvia, who was located in Maryland.

The next day Brown spoke with Sylvia by phone and expressed his desire to retire under the 80 and Out plan. Sylvia asked for identifying information from Brown and told him that she would put together some paperwork for him to fill out and send it to him in about a week. Brown's designated retirement date was the last day of April. Sylvia sent Brown the paperwork and he began completing it.

On cross-examination Brown testified as follows regarding his telephone conversation with Sylvia:

> Q ... [D]idn't she tell you that you were eligible for the medical early retirement, but that you were not eligible for full early retirement, with -- when I say full, full retirement benefits based on your age?
> A What little I talked to her that day, that I was for this, what we voted on, the early retirement and insurance.
> Q Right. So what she was -- but she didn't give you any specific dollar amount that your retirement benefit would be, she simply said, based on 58 years of age and 32 years of service, you're eligible for the 80 and out?
> A Yes, sir.
> Q And, during that conversation, didn't she specifically tell you that your pension, your retirement benefit, would still be considered an early pension?
> A Well, early in terms of my age and years, but not prorated. It would be as if I was 65 and not get a pro -- a lesser amount. It would be the full --
> Q [interrupting the witness] Is that what she said to you or is that what you gleaned from he conversation?
> A That's what she said to me.
> (Respondent Exhibit 5 marked for identification)
> Q BY MR. BERNSTEIN: I'm going to show you what I've marked as Respondent's Exhibit No. 5 and I'd like you to read that for a moment. Take your time. Did you have a chance to read it?
> A Yes, sir.
> Q You've never seen this document before, have you?
> A No, sir.
> Q Does this refresh your memory with respect to what Ms. Sylvia told you about the level of your pension benefit? And I'll refer you specifically to the sentence that starts -- it's right in the middle of that big paragraph, in the middle, and I quote: "He will be eligible for the retiree medical. However, the pension estimate will still be considered an early pension." And it says he understood.
> A Yes.
> Q Does that refresh your memory of the conversation?
> A Yes, sir.
> Q Is that accurate?
> A That is accurate, sir.

The document shown to the witness was not identified. Sylvia was not called as a witness and she was not shown to be unavailable. Based on the quoted testimony by Brown, I conclude that in the course of the phone conversation Sylvia told Brown that he was eligible for the new 80 and Out pension, that she did not give Brown an estimate of the amount of his pension under 80 and Out, that in the course of their conversation Sylvia told Brown that his pension would "be considered an early pension", but she never explicitly explained to Brown that he would not receive the same unreduced pension he would receive had he been retiring at age 62. Judged by his testimony and his subsequent actions, the weight of the evidence is that

Brown did not understand, at the conclusion of the conversation with Sylvia, that he was not viewed as being eligible to retire with an age 62 pension.

Sylvia sent the retirement package to Brown and he began gathering the necessary information and completing the retirement process. Brown went to the personnel office in April to get a "statement of tenure" that was part of the retirement process. He was called into an office and both Kraft and Barnett spoke with him. Brown was told that there was some unspecified problem with implementing the 80 and Out plan and he was asked to delay his retirement two weeks. Brown agreed and took two weeks vacation. Following this meeting Brown called the Union to report that he was getting "the run around" on his retirement.

Production employee Stanley Koehler also contacted Sylvia about retiring under the 80 and Out plan. On April 14, Koehler, who was then on extended sick leave, spoke to Barnett about extending his sick leave. Barnett suggested that Koehler consider the 80 and Out plan, because Koehler's age and years of service appeared to meet the criteria. Barnett told Koehler to get Sylvia's phone number from Jones, which he did. Koehler offered volunteered testimony on direct examination that Jones, with Barnett not present, gave him a rough estimate as to how much he would receive under 80 and Out. Responding to a later question from the bench regarding this testimony, Koehler testified that Jones used a calculator and multiplied his years of service "times something" and "told me I was going to make so much money a month on the 80 and out". I have attached little weight to this testimony. There is an absence of a foundation showing how Jones came to make the asserted calculation and Jones was not shown to be an agent. The General Counsel has not contended that this asserted calculation by Jones is probative on the matters at issue. Koehler retired after contacting Sylvia, but did not retire under 80 and Out.

After the Respondent prepared drafts of the new contracts they were submitted for the Union's review. Brumley reviewed the drafts, made editorial corrections that are not challenged and returned them to Barnett around the first of April, to be put in final form for signature. The draft of the Production contract included the following:

> Retirement Plan
>
> For employees retiring on or after March 1, 2004, the benefits shall be $23.00 for all past and future years of credited service. A copy of the retirement plan will be provided to employees. The Company will provide all employees the choice of the Defined Benefit Plan or the Company 401(k) Plan. An employee that chooses the 401(k) Plan will be required to freeze the Defined Benefit Plan at the level of benefit and the number of years of service. Once the 401(k) Plan is chosen, there are no return rights to the Defined Benefits Plan. All new hires on or after March 3, 2001, will be eligible for the 40 1(k) Plan only.
>
> Employees will have the option upon reaching combined age and years of service totaling 80 years for retirement with full benefits at the age 65 level medical insurance cost and benefits.

The draft of the Maintenance contract included the following:

> Retirement Plan
>
> The Lily-Tulip Hourly Retirement benefits shall be $23.00 for all past and future years of credited service. A copy of the Retirement Plan will be provided to

> employees. The Company will provide all employees the choice of the Defined Benefit Plan or the Company 401(k) Plan. An employee that chooses the 401(k) Plan will be required to freeze the Defined Benefit Plan at the level of benefit and the number of years of service. Once the 401(k) Plan is chosen, there are no return rights to the Defined Benefits Plan. All new hires on or after March 3, 2001, will be eligible for the 40 1(k) Plan only.
>
> Employees will have the option upon reaching combined age and years of service totaling 80 years for retirement with full benefits at the age 65 level medical insurance cost and benefits.

The wording of the separate Pension Plan, referred to in the expired agreements and in each of the drafts of the two new contracts, was not shown to have been changed.

The corrections that the Union made in the drafts of the two agreements prepared by the Respondent have not been challenged and I find that the corrected drafts contain the contract language agreed to by the Respondent and the Union. The effective date of each agreement was March 14, 2004 through March 4, 2007. The Respondent did not, however, put the drafts in final form or sign them. The acknowledged sole reason for the Respondent's non-action was the agreed upon wording of the 80 and Out provision.

Kraft testified that the first information he received that there was any "bump in the road" regarding implementing the 80 and Out program was when Brumley called him to report that Brown had complained that Brown was "not receiving, you know, prompt attention to the Program." Kraft placed the call in mid to late April. This was the first conversation between the Respondent and the Union regarding 80 and Out since the conclusion of the negotiations on March 10. I conclude that this call was placed following the request to Brown that he delay his retirement two weeks.

While he was on vacation during the first two weeks of May, Brown received a May 6 letter from Sylvia. The letter stated:

> I am responding to a letter you received from Advanced Benefits Resources dated April 28, 2004. That letter advised you of approval into the retiree medical plan. The program that would grant you eligibility into the retiree medical plan, earlier than age 60, has not been approved and is still under consideration at Solo Cup Company. Unfortunately because of this error, your approval has been rescinded.

On about May 12, Barnett called Brumley and arranged a meeting that was held at the Plant on morning of May 14. Those present were Barnett, Kraft, supervisor Dave Mathis, Brumley, Shortt, and steward Charles Edwards.

At the meeting Kraft spoke from a script. He stated that there were three issues under the new contracts that needed to be addressed. Kraft took the position that there was a difference in understanding and that there had not been a meeting of the minds regarding the three issues. One of the issues was 80 and Out. (The other two issues were ultimately not obstacles to the Respondent signing the agreements and are not at issue.) Brumley testified that he asked what the Respondent's problem was with 80 and Out. Kraft testified that he explained that the Respondent understood the 80 and Out provision entitled an employee to receive the age 55 early retirement benefits, actuarially reduced to age 55, and medical benefits of an employee retiring at age 65. Brumley testified that Kraft did not offer any such explanation,

but stated that legal counsel had advised him to say no more. There was credible corroboration of Brumley's version. The script had a note by Kraft, "don't intended to discuss specifics with Brumley." In a memo by Kraft summarizing what happened at the meeting he did not mention the purported explanation of the Respondent's understanding of the meaning of the agreed upon 80 and Out language. Considering the foregoing and the demeanor of the witnesses, I credit Brumley's version regarding this conversation.

Later on May 14, Kraft and Brumley had a second discussion that was initiated by Kraft. No one else was present. According to Kraft, he reiterated that there was definitely a misunderstanding and that there was no way that the company would have agreed to change the actual pension and retirement plan and that he was hopeful that there was something the parties could do to resolve the issue, perhaps by increasing other benefits or revisiting other provisions that had been agreed upon. In contrast to Kraft, Brumley testified that Kraft said, "The company had agreed to something that was going to be very, very expensive to them and the funding was going to be somewhere around $9,000,000.00 and he said, you know, if we could get that back, we'd be willing to trade that for something and maybe get somebody some money on the defined benefit plan or do something like that." Brumley's testimony regarding this second conversation was unconvincing. Considering the probabilities, particularly the fact that Kraft adhered to his script in the earlier meeting that day, and the more credibly offered testimony of Kraft regarding this conversation, I credit Kraft.

Kraft and Brumley again met on May 18, in Brumley's office. Brumley testified:

> [Kraft] said again the problem with the 80 and out was funding and the company had agreed to something ... that's going to be very, very expensive them because of the funding and again, I believe, $9,000,000.00....

Kraft agreed with Brumley's testimony that on May 18 he asked Kraft if the Respondent's 80 and Out proposal had been submitted to the "bean counters".[6] According to Kraft, he told Brumley that it had not been submitted because the company had not understood it to be a full retirement option. Kraft agreed that he estimated the cost of an unreduced pension to be about $9,000,000.00. Kraft credibly testified he told Brumley there was a difference between what the Union thought and what the Company thought had been agreed to. I do not credit Brumley's testimony, quoted above, that Kraft said that the "company had agreed to something ... that's going to be very, very expensive...." This credibility resolution is based upon the same reasons I did not credit his similar testimony regarding the May 14 meeting.

At the May 18 meeting Kraft expressed a wish to meet again regarding 80 and Out. On May 20, Brumley wrote to Kraft and indicated a willingness to meet. On June 15, however, Brumley wrote Kraft again and stated that the Union would not meet and asserted that the Respondent's unwillingness to sign and implement the agreement reached was an unfair labor practice.

B. Analysis and Preliminary Conclusions

The written contract terms agreed to by the Union and Respondent are not in dispute. The terms are "Employees will have the option upon reaching combined age and years of

[6] Kraft's testimony was that this meeting occurred on approximately May 20. The weight of the evidence is that the correct date is May 18. The variance is not significant.

service totaling 80 years for retirement with full benefits at the age 65 level medical benefits and costs."

The General Counsel contends that the agreed language is unambiguous, arguing,

> The word "full" is defined, inter alia, as "complete; entire; maximum" and "of the maximum size, amount, extent, volume." Webster's New Universal Unabridged Dictionary (1996). Given that Respondent's witness Boyles acknowledged that the agreed-upon language contains no reference to a reduced pension benefit, there is no logical basis for concluding that Respondent actually believed that the parties' agreement included a reduced pension benefit. Accordingly, Respondent's contention that the parties' agreement was ambiguous is wholly without merit.

The Respondent contends that the agreed language is ambiguous and susceptible to two interpretations. The Respondent points to the fact that the Pension Plan has two separate sections specifying the pension amounts: Section D, which specifies the "Amount and Form of Monthly Pension At or After Age 65," and Section E, which specifies the "Amount and Form of Early Retirement Pension." Based on that fact the Respondent argues:

> Neither of these sections makes reference to "full benefits." Given, moreover, the introduction of an entirely new criteria for retirement which does not fall within either of the types of retirement specified in Sections D and E of the summary, there is simply no way to determine what "full benefits" refers to where an employee younger than age 55 decides to retire because he has the requisite service to reach a combined 80 years. On the one hand, "full benefits" (as the Company understood it), could reasonably refer to the "full benefits" that the employee would receive had he retired at age 55. On the other hand, "full benefits" (as the Union understood it), could reasonably refer to the "full benefits" that the employee would receive had he retired at age 65. Any ambiguity could have been resolved if the parties had simply included the reference to age, i.e., "with full age 65 benefits," or "with full age 55 benefits." There is, however, no such reference, unlike the provision for retiree medical benefits, which clearly indicates the same level of benefits as if the employee had retired at age 65, rather than age 62, which would have entitled the retiring employee to more medical coverage.

In support of their positions the Respondent and the General Counsel cite *Hempstead Park Nursing Home*, 341 NLRB No. 41, slip op. at 2-3 (February 27, 2004). In *Hempstead* the Board stated:

> Pursuant to Section 8(d) of the Act, either party to a collective bargaining agreement is obligated to execute, or assist in executing, a memorialized version of the agreement if requested to do so by the other party. *H.J. Heinz Co. v. NLRB,* 311 U.S. 514 (1941). However, this obligation arises only after a "meeting of the minds" on all substantive issues and material terms has occurred. See *Intermountain Rural Electric Assn.,* 309 NLRB 1189, 1192 (1992). The General Counsel bears the burden of showing that the parties have reached the requisite "meeting of the minds*." Id. at 1192*.
>
> A "meeting of the minds" in contract law is based on the objective terms of the contract rather than on the parties' subjective understanding of the terms. Thus,

> subjective understandings (or misunderstandings) of the meaning of terms that have been agreed to are irrelevant, provided that the terms themselves are unambiguous "judged by a reasonable standard." *Vallejo Retail Trade Bureau*, 243 NLRB 762, 767 (1979), enfd. 626 F.2d 119 (9th Cir. 1980). However, when the terms of a contract are ambiguous, and the parties attach differing meanings to the ambiguous terms, a "meeting of the minds" is not established. Ambiguity is defined, inter alia, as the "maintaining of two or more logically incompatible beliefs or attitudes at the same time or alternately." Webster's Third New International Dictionary 66 (3d ed. 1966). "When ... misunderstandings may be traced to ambiguity for which neither party is to blame, or for which both parties are equally to blame, and the parties differ in their understanding, their seeming agreement will create no contract." *Meat Cutters Local 120 (United Employers, Inc.),* 154 NLRB 16, 26- 27 (1965) (emphasis in original; footnote moved into text).

The meaning of the term “full benefits” as used in the agreed upon 80 and Out contract provision is not defined in the labor agreements or the Pension Plan nor was the meaning of the term explicitly addressed in negotiations. Accordingly, it is necessary to first to determine whether other objective evidence shows that the parties attached meanings to the term that are inconsistent with a "meeting of the minds".

The Union’s initial 80 and Out proposal was to expand the existing defined benefit plan for employees hired before March 3, 2001. Later hired employees were already excluded from the defined pension plan and the Union never urged in the 2004 negotiations that the Pension Plan be made available to the later hired employees. Thus, the 80 and Out proposal would affect the retirement benefits of a limited class of employees then working at the Springfield facility. The 80 and Out agreement was optional and would benefit only retiring employees under age 62.

The evidence shows that the Union considered 80 and Out to be a major issue. In sharp contrast to the Union’s initial proposal, the Respondent proposed to freeze the pension plan and make only a 401(k) plan available to all employees. This was consistent with the Respondent’s expressed intent to cut costs, which were described as being far greater at the Springfield facility than at other of the Respondent’s plants. There is no question that benefits costs were a significant issue for the Respondent.

An expansion of the defined benefit pension would involve increased costs. I infer that the repeated use of the term “full benefits” was not inadvertent. The absence of any discussion in negotiations of how a pension would be calculated under 80 and Out is objective evidence that the parties did not then understand the meaning of the 80 and Out agreement, including the meaning of “full benefits” to be unclear.

The Respondent contends, in substance, that it would not have agreed to pay employees under 80 and Out at the age 62 unreduced pension level because of the potential associated costs and that it should therefore be inferred that the Respondent contemplated an actuarially reduced pension like that described in the Pension Plan because the evidence shows that the Respondent was seeking to reduce pension costs. I decline to infer, on that basis, that the Respondent understood 80 and Out to contemplate an actuarially reduced pension. It is equally reasonable to conclude that the Respondent’s negotiators simply did not sufficiently appreciate the potential costs of 80 and Out at the age 62 pension level until after negotiations were complete. Kraft claimed that the Respondent did not consider the agreed upon 80 and Out to be a problem until Brumley called him regarding a delay in processing Brown’s retirement. In

fact, Brumley called Kraft only after Kraft and Barnett had asked Brown to postpone his retirement. Absent any other credible explanation for delaying Browns retirement, I infer that that management independently had second thoughts about the cost of the 80 and Out agreement before Brown was asked to delay his pension.

Barnett testified that when Brown met with him to begin the retirement process, there was no discussion of the level of Brown's pension. The delay in processing Brown's pension was not adequately explained and the record does not show that the reason was related to any confusion expressed by employees. In the absence of any other cogent explanation, I infer that Brown was asked to postpone his retirement to allow the Respondent time to address the implications of the 80 and Out agreement.

The record evidence is that the employees understood that retirement under 80 and Out would include an age 62 pension. Because retirements were handled by corporate personnel and Brown was working with Sylvia, the most probable explanation for delaying Brown's retirement is that management above the plant level had reviewed the agreement that had been negotiated after Sylvia spoke with Brown and the Springfield management was then told to renegotiate 80 and Out.

The reference to the Pension Plan in the negotiated agreements serves to make the Pension Plan part of the labor agreements. The Pension Plan provides for two categories of retirement. One category, described in Sec. II. D is for retirement at "normal retirement age" of 65, while Sec. II. E provides for an "early retirement pension" for persons under the age of 65. The intent of the negotiated 80 and Out plan was to provide new pension and medical benefits that would benefit only retirees under age 62. The 80 and Out plan defined the benefits it conferred by reference to the preexisting benefits described in the Pension Plan and the collective bargaining agreements.

The weight of the evidence is that the term "full benefits" was deliberately included in the agreed contract language and was intended by the parties to have significance. Because the negotiated 80 and Out plan precisely described the new medical benefit, I conclude that the term "full benefits" is an unambiguous reference to the level of pension benefits under the terms of the Pension Plan.

The maximum pension available under Sec. II. E of the Pension Plan is identical to the maximum pension available under Sec. II. D. The unreduced pension is calculated by multiplying years of service times the annual credit factor of $23.00. I find unconvincing the Respondent's contention that "full benefits" can reasonably be read as meaning a reduced pension under Sec. II. E of the Pension Plan.

Based on the foregoing, I conclude that in the context of the facts of this case the term "full benefits" is unambiguous "judged by a reasonable standard." *Vallejo Retail Trade Bureau*, supra. Accordingly, under the standards stated by the Board in *Hempstead Park Nursing Home,* supra, there was an objective meeting of the minds regarding 80 and Out. The Respondent has a duty to sign and comply with the agreement reached, including paying eligible employees an unreduced pension.

Assuming, without finding, that the term "full benefits" is ambiguous "judged by a reasonable standard", I would nevertheless conclude that the Respondent is bound by the Union's understanding of the meaning of the agreement reached and ratified.

In *Meat Cutters Local120,* supra*,* quoted by the Board in *Hempstead*, supra, the hearing examiner goes on to state:

> The decisional rules or principles clearly reflect some qualification of the general contract law doctrine that manifestations of mutual assent, given by the parties to an informal contract, are essential to its formation, regardless of the possible absence of mental assent. *Williston on Contracts*, § 22 (3d ed. 1937); Restatement, Contracts §§ 20, 71 (1932). Within Restatement, these qualifications of the general contract law doctrine have been the subject of comment, as follows:
>
> > The mental assent of the parties is not requisite for the formation of a contract.... If the manifestations of the parties have more than one reasonable meaning, it must be determined which of the possible meanings is to be taken. If either party has reason to know that the other will give the manifestations only one of these meanings and in fact the manifestations are so understood, the party conscious of the ambiguity is bound in accordance with that understanding. On the other hand, if a party has no reason to suppose that there is ambiguity, he may assume that his words or other acts bear the meaning that he intended, that being one of their legitimate meanings, and he will not be bound by a different meaning attached to them by the other party.

The foregoing comment from the Restatement, Contracts is found in the current version of the Restatement and reflects long settled principles of contract law.

A preponderance of the evidence shows that Boyles, Kraft and Barnett knew that the Union negotiators understood on March 9, if not earlier, that the 80 and Out proposal contemplated an unreduced pension. Thus, the discussion of the pensions employees would receive after the Respondent agreed to 80 and Out on March 9, and Shortt's calculations of pensions at the negotiation table put the Respondent on notice of the Union's understanding of 80 and Out. There is no substantial objective evidence that the Union was on notice of any understanding by the Respondent inconsistent with its own understanding prior to final agreement on May 10. Accordingly, since the Respondent would have been aware of the asserted ambiguity, the Respondent is bound in accordance with the Union's understanding. *Meat Cutters Local120,* supra, quoting the Restatement, Contracts, §§ 20, 71 (1932).

Conclusions of Law

1. Solo Cup Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood Of Electrical Workers, Local 1553 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Sec. 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, I find that it must be ordered to cease and desist from its unlawful conduct and to take affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent shall be ordered to

implement the collective bargaining agreements ratified on March 14; execute the written agreements delivered to it by the Union on or about April 1; to give retroactive effect to the terms and conditions of employment contained in the agreements, retroactive to March 14, including the 80 and Out retirement plan consistent with this decision; and to make unit employees whole for any losses they may have suffered as a result of the Respondent's unlawful refusal to comply with and execute the new contracts. Employees entitled to be made whole include any employees in the collective bargaining units covered by the collective bargaining agreements who have ended active employment with the Respondent from March 14, 2004, to the date of compliance who would have been entitled to retire under the 80 and Out plan and who received less retirement benefits that they would have received under the 80 and Out plan with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1978). Mitigation shall not be a consideration in computing back pension benefits. Finally, Respondent should be ordered to post an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[7]

ORDER

The Respondent, Solo Cup Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to execute and comply with the collective bargaining agreements reached with International Brotherhood Of Electrical Workers, Local 1553 effective on or about March 14, 2004, covering the maintenance unit and the production unit in Springfield, Missouri.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the collective bargaining agreements delivered to the Respondent on or about April 1, 2004, covering the maintenance unit and the production unit in Springfield, Missouri.

(b) Make employees whole, with interest, for any losses they may have suffered as a result of the Respondent's refusal to comply with the 80 and Out retirement agreements reached on March 14, 2004, as described the Remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

an electronic copy of such records if stored in electronic form, necessary to analyze the amount of unpaid pension due under the terms of this Order.

(d) Within 14 days of service by the Region, post at its Springfield, Missouri facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous place, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 2004.[8]

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 28, 2006

Thomas M. Patton
Administrative Law Judge

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to execute the collective bargaining agreements delivered to us on or about April 1, 2004, incorporating all of the provisions contained in the collective bargaining agreements entered into between International Brotherhood Of Electrical Workers, Local 1553 on March 10, 2004 and us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL NOT in any like or related manner refuse to bargain in good faith with INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1553 as the collective bargaining representative of the Springfield, Missouri employees that union represents.

WE WILL execute the collective bargaining agreements delivered to us on or about April 1, 2004 and we will give effect to all of the provisions contained in that agreement, retroactive to March 14, 2004.

WE WILL whole any retired employees who were denied pension benefits under the 80 and Out provisions for which they were eligible.

Employees entitled to be made whole include any employees in the Springfield, Missouri collective bargaining units covered by the collective bargaining agreements who have ended active employment with the Respondent from March 14, 2004 to the date of compliance and who would have been entitled to retire under the 80 and Out plan and who received less retirement benefits that they would have received under the 80 and Out plan.

SOLO CUP COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

8600 Farley Street, Suite 100

Overland Park, Kansas 66212-4677

Hours: 8:15 a.m. to 4:45 p.m.

913-967-3000.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 913-967-3005.